

Decision Notice
for the
Permit Application from Flathead County
for
Boat Ramp Construction on Church Slough

Supplemental Environmental Assessment

Prepared by:

MONTANA FISH, WILDLIFE & PARKS
Region 1

Fisheries Bureau



***Montana Fish,
Wildlife & Parks***

DECISION NOTICE
**Permit Application from Flathead County for Boat Ramp Construction on Church
Slough Supplemental Environmental Assessment**

July 19, 2013

Background

In October 2009, Flathead County submitted an application for a 124 permit pursuant to the Montana Stream Protection Act (87-5-501 through 87-5-504 MCA) to Montana Fish, Wildlife & Parks (FWP) in preparation for the development of a boat ramp at Church Slough. In response to the application, FWP prepared an environmental analysis pursuant to the Montana Environmental Policy Act (MEPA) and Administrative Rules of Montana (ARM) 12.2.430 through 12.2.433. FWP review of the county's design plan was to determine if the plan is technically sufficient and if the project would adversely affect any fish or wildlife habitat in accordance with the Stream Protection Act.

The following chart chronicles the events following the preparation of the environmental analysis and why this supplement was prepared:

| Event: | Date: |
|---|---------------|
| FWP Environmental Assessment Distributed For Public Review | February 2010 |
| FWP Decision Notice Published | April 2010 |
| County Constructs Boat Ramp | May 2010 |
| Lawsuit Filed to Challenge FWP's Decision | June 2010 |
| County Boat Ramp Closed by Court Order | June 2012 |
| Court Directs FWP to Complete a Supplemental MEPA Analysis Document | January 2013 |

This EA focused on the directions set forth in the remand order by Flathead District Court, which requires FWP to analyze a new alternative (carry-in boat access) that was not included in the 2010 environmental assessment (EA) and complete a more comprehensive analysis of secondary and cumulative impacts of the proposed action. The significance of those impacts to the human environment, both beneficial and adverse, is determined by using the criteria described in the Administrative Rules of Montana (ARM) 12.2.431(a-g).

The additional analysis was conducted based on information that was available when Flathead County's 124 permit application was originally reviewed by FWP in 2009.

Alternatives:

- A. **No Action:** FWP would deny the permit request.
- B. **Proposed Action, 124 Permit Approval:** Grant approval for a Montana Stream Protection Act (SPA 124) permit submitted by Flathead County for construction of public boat access to Church Slough. The proposed project includes construction of a vehicle turnaround, parking, and installation of a concrete boat launch on county-owned property.
- C. **Carry-in Boat Access:** FWP would recommend a modification to Flathead County's request to build a formal boat ramp area at the property as originally described. FWP would request the county provide a carry-in boat access, which would require boat owners to transport their boat or personal watercraft (i.e., kayak, canoe, jet ski, etc.) between the parking area and shoreline by hand or with the use of a hand trailer.

Location of Project:

Church Slough is located in Flathead County (T28N, R21W, S36) south of the City of Kalispell on Wagner Lane, north of the intersection with Lower Valley Road.

Public Involvement:

In compliance with the court's order, FWP prepared a supplemental EA and circulated it for public comment from June 3 through July 4, 2013. Notices of the publication of the EA were advertised in two local newspapers (Daily Inter Lake and Flathead Beacon), a news release was done, and notification was mailed to county commissioners, regional legislators, local nonprofit organizations, natural resource agencies, and other interested parties. The supplemental EA was also available at local libraries, the FWP Region 1 headquarters in Kalispell, and via the FWP internet web site. Additionally, an announcement of the supplemental EA was sent to all parties who submitted comments on the original 2009 Church Slough EA.

Comment Summary:

FWP received 150 comments via email, regular mail, phone, and a comment drop box at the project site.

Each alternative had some level of support by those who commented, with one organization supporting Alternative A (no action), 114 individuals supporting Alternative B (approve permit for boat ramp), five individuals supporting Alternative C (carry-in boat access), and one individual supporting Alternative B or C. Twenty-eight individuals did not specify any preference.

The following is a summary of common themes supporting each alternative, as well as FWP responses to questions. Many of the comments with no preference to any of the

alternatives and some supportive of Alternative B simply asked for the launch to be reopened.

Comments in support of Alternative A (No Action):

- This option would best protect and maintain the waterfowl use on the slough.

Comments in support of Alternative B (Approval of 124 Permit for Boat Ramp):

- Public access point to the slough is necessary to replace the access lost when the old roadbed of Wagner Lane was abandoned.
- Inconvenient to launch from other sites along Flathead River to fish or boat on the slough.
- Some boating restrictions are ok to decrease impacts, such as no-wake zone or speed limits.
- Additional public access to the river corridor is needed to accommodate a growing population and their recreational needs.
- In the creation of a formal access point, the county may be able to avoid many of the impacts caused in the past and potential under Alternative A by members of the public, such as trespass on adjoining private property and creation of paths.
- This alternative is the best option for seniors launching their boats and accessing the slough. Alternative C would be too difficult.

Comments in support of Alternative C (Carry-in Access):

- Hand-carry launch is more similar to the previous primitive access point than Alternative B.
- The current 10 hp restriction at the ramp is not enforced.
- Would discourage the use of larger boats at the site and would help preserve the natural habitat for wildlife and birds.
- Another access point to the slough for motor boats is unnecessary when more appropriate alternatives exist in the area for motorized water use.

General comments beyond FWP's decision-making authority for this site:

- The boat and motor size restrictions for the use of the ramp need to be removed.
- Add a port-a-potty to the site.
- Provide dog waste bags.
- Add a wheelchair-accessible ramp to the picnic tables.
- Request neighborhood dogs are kept within the boundaries of the owner's private property.
- Gravel the parking area.
- Reestablish the old roadbed of Wagner Lane if the boat ramp can't be opened.
- Trade the land if the boat launch can't be used.

Questions and comments with FWP responses:

- 1) The proposed width of 10'-11' for the carry-in ramp may not be wide enough and recommend a 12' width be considered instead.

FWP's response: There are no standards for carry-in ramps. FWP suggested the minimum width thought to be necessary for safe access for most users and boats.

- 2) The fall running and spawning of whitefish and lake trout that follow are not listed. Should they not be?

FWP's response: The fall running and spawning of whitefish and lake trout that follow are not listed because they generally do not enter Church Slough due to warm water temperatures. Lake whitefish spawn in the river up to the confluence of the South Fork of the Flathead River with the majority of the fishery being upstream of the confluence with the Stillwater River. FWP is not aware of large concentrations of lake whitefish in Church Slough. An access at Church Slough would not likely be popular with fall lake whitefish anglers due to its location below the spawning reach and that there are closer access points. Lake trout do not have a spawning run up the Flathead River, but some do follow the lake whitefish and are captured by anglers.

- 3) Would the concrete boat ramp be long enough under water to accommodate launching in November?

FWP's response: Possibly not all types of boats could be launched that time of year since Flathead County designed the ramp to accommodate primarily summer, full pool use. In November the water level in Flathead Lake is generally within two feet of the full pool level. Since the lake level affects the level of water on the ramp, there should be one to two feet of water on the ramp. This level will accommodate launching by some trailers, likely smaller boats that can launch under shallow conditions. The shallow water may make launching a larger boat and trailer difficult or prohibitive.

- 4) Based on the information about changing water levels and the design of the end of the boat ramp in the draft EA, if the erosion at the end of the ramp creates a hole, then a boat trailer dropping off the end could cause damage to a boat or its motor; why construct a ramp to only three feet below the summer full pool elevation?

FWP's response: Flathead County designed the ramp to replace access at the old access site, which was primarily a high-water launch. Cost was taken under consideration in the county's design of the ramp. Holes at the end of the ramp are caused by power loading, using the boat motor to push a boat onto the trailer. Power loading is a site management challenge under the jurisdiction of Flathead County and beyond the scope of the SPA permit.

5) Why did FWP choose to do the supplemental analysis in an earlier timeframe and disregard the experiences of two years of full activity and one of limited activity at the site, as well as more recent FWP angling surveys?

FWP's response: FWP acknowledges the fact that time has elapsed since its original decision to grant Flathead County's 124 permit application. In fact, in this decision notice, I do note that certain mitigation measures have been taken. However, the court remanded FWP's EA to the agency for additional analysis because it determined that FWP failed to consider relevant factors and information available at the time of its decision on Flathead County's 124 permit application. Therefore, the supplemental analysis was conducted as if FWP were preparing the EA prior to its original decision.

6) Steps to mitigate potential impacts are omitted from the document.

FWP's response: FWP disagrees. The county plan describes the installation of riprap along the edges of the bank at the site to stabilize the banks near the ramp to reduce erosion, and disturbed areas on along the bank would be revegetated with grass seed. Revegetation also helps to stabilize the slough's banks and reduce the potential for noxious weeds from becoming established.

The FWP Commission has the authority under Montana Statute § 87-1-303(2) to adopt and enforce rules governing recreational uses of all public fishing reservoirs, public lakes, rivers, and streams that are legally accessible to the public. These rules are adopted in the interest of public health, public safety, public welfare, and protection of property and public resources. As described in the supplemental EA, the Commission could establish boating speed regulations, seasonal closures, or no-wake zone for Church Slough if necessary to protect fish or wildlife or the public interest. In fact, the Commission approved the seasonal closure of Church Slough for March 1 - April 10 on April 14, 2011, to protect waterfowl during their spring migration. A no-wake zone for the slough was considered at the same time, but the Commission followed the regional staff recommendations not to approve it at that time based on majority public and landowner comment. The no-wake zone could be reconsidered in the future and used as a tool to decrease impacts to wildlife and fisheries and the potential for wave-induced erosion.

Furthermore, there are additional references noted in the supplemental EA to methods that could be used to eliminate or diminish resource impacts, such as the placement of bear-resistant garbage receptacles and informational signage to be "bear aware" at the site. At the time of the original analysis, it was unclear whether any identified mitigation measures would be necessary or not.

7) Based on information reflected in FWP's North Shore State Park EA (2008), it appears that radio-collared grizzly bears are shown to be within ¼ mile of Church Slough. However, this conflicts with the grizzly locations noted in this EA. Please clarify.

FWP's response: The discrepancy of information between the two documents is from the use of different research information. The image shown in the 2008 North Shore State Park/WMA Acquisition EA (page13) reflects the movements of a single male grizzly bear in the Flathead Valley during the summer of 2003. The information presented with that image does not make that distinction clear, which was an error on the preparer's part. The grizzly was recorded following the crop of ripe berries through the river's vegetation. The image was generated by one of FWP's wildlife biologists.

The information presented in the supplemental EA was taken from the Montana Natural Heritage Program's Tracker database, which among many of its functions can collect point observations of Montana's wildlife and fisheries species. The grizzly from the 2003 radio collar research was not recorded in the Tracker database and, thus, was not reflected in the supplemental EA.

FWP appreciates this discrepancy was brought to our attention because without complete information, full assessments are difficult to complete.

The addition of the 2003 grizzly observation near the confluence of Church Slough and the Flathead River does not change FWP assessment of the potential impacts to grizzlies or to the public's safety if the Department approves the 124 permit application. As described in the supplemental EA, no impacts are anticipated to transient grizzly bears moving through the Flathead Valley if the boat ramp is constructed. Grizzlies have been recorded at various locations within the Flathead Valley since 1975 and are likely to be seen in the valley in the future as they move between mountain habitats and forage along streamside vegetation. The establishment of a formal boat ramp area is not expected to draw grizzly bears specifically toward Church Slough.

8) Church Slough appears to be an important foraging area for bald eagles. Why was this not mentioned in the EA? Won't an increase in motorized water craft usage of the slough impact foraging eagles?

FWP's response: Bald eagles forage throughout the Flathead River corridor including the sloughs. Although bald eagles are commonly seen on Church Slough, the slough is not unique in its foraging resources. Eagles have a very diverse and seasonal diet including fish, waterfowl, and mammals, resources easily accessible in nearby sloughs or the river channel. In 2010, FWP prepared the Montana Bald Eagle Status Report for 2009 in which the current status of the Montana eagle population is discussed. Since 1980, the bald eagle nesting population in the Upper Columbia Basin in Montana (which includes the

Flathead River System) has dramatically increased from less than 20 to over 200 territories. And according to FWP surveys, since 2009 it has continued to increase. This demonstrates that existing activities, including boating and shoreline construction, on the rivers and lakes in the Flathead Valley are not having a negative impact on population growth.

As described in the supplemental EA, FWP does not expect the proposed project to adversely affect bald eagles. In making this determination, FWP followed the guidance in the Montana Bald Eagle Management Guidelines: An Addendum to Montana Bald Eagle Management Plan (2010) which provides recommendations to minimize or avoid impacts to bald eagles. These guidelines recommend that construction of new marinas with routine use of six or more boats be located ¼ mile away from a nest if a visual buffer is present and ½ mile away if there is not a visual buffer or located only as close as existing tolerated similar activity. The closest nests are located at a greater distance than the ½ mile from the county's property and there is no direct line of sight with the nearest recorded nest. The approval of the permit application is not in conflict with this recommendation.

Bald eagle are also protected under the Bald and Golden Eagle Protection Act (BGEPA). BGEPA prohibits anyone, without a permit, from 'taking' bald or golden eagles, including their parts, nests, or eggs, where "take" means pursue, shoot, shoot at, poison, wound, kill, capture, trap, collect, destroy, molest, or disturb AND "disturb" means to agitate or bother a bald or golden eagle to a degree that causes, or is likely to cause, based on the best scientific information available, (1) injury to an eagle, (2) a decrease in its productivity, by substantially interfering with normal breeding, feeding, or sheltering behavior, or (3) nest abandonment, by substantially interfering with normal breeding, feeding, or sheltering behavior.

The slough and the adjoining river corridor have been under consistent seasonal use by motorized water craft for many years without causing negative effects to nesting and foraging eagles. Use of the slough and river corridor by motorized water craft does not appear to be in conflict with BGEPA because there has not been a decrease in the species' productivity as defined above. The approval of the 124 permit for the construction of the boat ramp is not expected to increase use to the slough to substantially interfere with the normal feeding of area bald eagles.

As described previously and in the supplemental EA, FWP's Commission does have the authority to establish restrictions for recreational uses of water bodies for the public resources, such as wildlife and fisheries, per Montana Statute § 87-1-302(2). If water craft activities were found to negatively impact bald eagles in the future, the Commission could establish boating speed regulations, seasonal closures, or a no-wake zone to diminish those impacts.

9) Why wasn't the U.S. Fish and Wildlife Service listed under the overlapping jurisdictions? Don't they have authority over threatened and endangered species?

FWP's response: You are correct and the omission of acknowledging the U.S. Fish and Wildlife's (USFWS) jurisdiction over threatened and endangered species was in error. As described in the EA, grizzly bears are listed as a threatened species under the Endangered Species Act. Bald eagles are delisted from ESA, but also under the jurisdiction of the USFWS through the Bald and Golden Eagle Protection Act and the Migratory Bird Treaty Act.

Decision and Justification:

MEPA requires that all environmental analysis documents contain a no-action alternative. In the present case, the no-action alternative is not a viable alternative due to the constraints imposed by the Stream Protection Act (SPA). Under SPA, FWP does not have the ability to deny a permit application outright. Rather, if FWP finds that the proposed action will adversely affect fish or game habitat, it must propose an alternative to the applicant. When FWP first received the county's application, it did indeed propose modifications – to decrease the width and length of the ramp so it would decrease disturbance to bank vegetation and restrict use during spring migrations of waterfowl when the water level is low. This was done informally, and Flathead County accepted. Therefore, the original EA was published with this modification built in.

As noted in the supplemental EA, the court instructed FWP to include another alternative – that of a hand-carry boat access. Therefore, due to the constraints of the Stream Protection Act, I see the decision space as between a carry-in access and a general-use ramp. I further note for the record, however, that should the original decision have been to recommend a hand-carry alternative, that would not necessarily have been the result. Rather, the county could have rejected the suggestion. If it had done so, FWP could have then opted to have the decision arbitrated per Montana Statute § 87-5-505.

Because the choice of alternative is bound by the requirements of SPA, I may only recommend the hand-carry alternative if, from the Department's analysis and the public comment, the "construction project or hydraulic project" will adversely affect any fish or game habitat." The recommendation must eliminate or diminish those adverse effects.

Having studied the Department's own analysis of the boat ramp alternative and the public comments and questions, I conclude that there is no likelihood of significant impact to fish and game habitat that would cause me to direct my staff to propose the hand-carry alternative to the county.

In the absence of such evidence, my decision is to reaffirm my original decision for the approval of the 124 permit to Flathead County for the construction of a boat ramp at Church Slough.

I am also required to follow the requirements of ARM 12.2.430(1), which states the agency needs to prepare an EIS whenever an EA indicates that an EIS is necessary or whenever, based on the criteria of ARM 12.2.43, the proposed action is a major action of the state government significantly affecting the quality of the human environment.

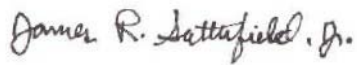
My review of the criteria and the analysis completed by the Department in the supplemental EA brought me to the following conclusions:

- 1) The severity, duration, and frequency for impacts to the fish and game habitat is negligible since there is no critical wildlife habitat at the slough and the potential impacts to waterfowl has been diminished by FWP's seasonal closure of the slough during spring migration. Potential impacts to other resources such as soils, vegetation, and recreation are likely to fluctuate depending upon the seasons and weather events.
The geographic extent of potential impacts is limited to the immediate area of the slough for many resources; however, if the ramp remains closed, other local boat ramps may see an increase in usage.
- 2) Some impacts to existing physical resources at the site will occur if the permit is granted as described in the supplemental EA. The probability of these changes is high if the permit is granted. But some of these impacts are likely to occur if the permit is denied since many water craft enter the slough from the Flathead River or private property along the slough and public may continue to use the county site on foot and establish trails. FWP does have the authority to establish a no-wake zone at the slough if negative impacts to fish and wildlife and the concerns of local landowners require a use restriction at the slough.
- 3) The construction of the boat ramp does not have any growth-inducing or growth-inhibiting aspects to the local area.
- 4) The county's property at the site has been subjected to multiple uses over time. The site does have some habitat value for transient ungulates, birds, and small mammals, but the habitat is not unique and other unimproved properties are nearby. However, a public access point to the slough is unique.
- 5) There is a high value placed on recreational resources in Flathead County and the public's ability to access bodies of water for fishing and boating. Based on public comment, many local residents of Flathead Valley want access to the slough restored.
- 6) No precedent would be set if FWP approved the county's 124 permit for the boat ramp that would commit the Department to future actions with significant impacts.
- 7) The approval of the county's plans to install a concrete boat ramp at the slough does not conflict with any local, state, or federal laws.

Therefore, I further conclude that affirming my original decision to grant Flathead County's 124 application and, indeed, the original decision itself, are not major actions of state government significantly affecting the quality of the human environment. I therefore reaffirm the statements made in the supplemental EA that the preparation of an EIS is not warranted.

Furthermore, FWP has the authority to complete an EA when statutory requirements do not allow sufficient time for the preparation of an EIS (12.2.430 (3)(c) ARM). The SPA requires the Department to inform an applicant within 30 days after receiving the applicant's application whether the construction project would have an adverse impact on fish or game habitat (§ 87-5-504 MCA). Admittedly, the Department took longer in informing the county on that determination in this case; however, the delay was approved by the county at the time. Generally speaking, the required 30-day response requirement is far too short to consider completing an EIS. In fact, the 30-day response requirement is difficult for even the simplest checklist EA and a very brief public comment period to be completed to meet the requirements of MEPA.

Editorial corrections identified by the public to the draft supplemental EA have been integrated into the final version of the EA, which will be distributed with this decision notice for the public's benefit. These corrections do not change the scope or the analysis completed in the draft supplemental EA by the Department.



7/19/13

James R. Satterfield Jr., Ph.D.
FWP Regional Supervisor

Date